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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SCOTT J. BARNHART,

Plaintiff,

vs.

Case No. 03-4214-JAR

**DOUGLAS COUNTY SHERIFF'S
DEPARTMENT, and
DEPUTY K. BELLINGER,**

Defendants.

**MEMORANDUM ORDER AND OPINION GRANTING
DEFENDANTS' MOTION TO DISMISS FEDERAL CLAIMS
AND REMANDING STATE LAW CLAIMS**

This comes before the Court on the defendants' Motion to Dismiss (Doc.9). Plaintiff Scott J. Barnhart, *pro se*, did not respond to the motion to dismiss, but instead filed his own Motion for Dismissal (Doc. 20) on the same day (April 21, 2004) that Magistrate Judge K. Gary Sebelius entered an order (Doc. 19) granting the defendants' motion to compel plaintiff to complete Rule 26(a) disclosures and certain discovery requests. On April 22, 2004, the defendants filed a Motion for Sanctions (Doc. 22) for plaintiff's violation of the Court's Protective Order (Doc.18), which prohibited him from making direct contact with Douglas County Sheriff Trapp, outside the presence of counsel. Plaintiff has not yet responded to the motion for sanctions, and it remains pending. Defendants have

also filed a Memorandum in Opposition (Doc. 24) to plaintiff's motion for dismissal, objecting to plaintiff's request that the case be dismissed without prejudice with defendants to bear costs and fees. Because the Court lacks subject matter jurisdiction of the state law claims, and because plaintiff's Complaint fails to state a claim cognizable under 42 U.S.C. § 1983, the Court grants defendants' Motion to Dismiss. The Court remands the state law claims back to the District Court of Douglas County, Kansas.

Plaintiff's Complaint

The Court recognizes that it should construe a *pro se* litigant's pleadings liberally, with a less stringent standard than pleadings drawn by attorneys;¹ if the pro se plaintiff's complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, it [the court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements."² Nor is it "the proper function of the district court to assume the role of advocate for the pro se litigant."³ Nor is the court to "supply additional factual allegations to round out a plaintiff's complaint."⁴

With these standards in mind, the Court summarizes plaintiff's Complaint as follows. Plaintiff states that his civil rights were violated when defendant Bellinger, a Douglas County Deputy Sheriff,

¹*Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

²*Id.*

³*Id.* See *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) ("Despite the liberal construction afforded pro se pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues.")

⁴*Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (citing *Hall*, 935 F.2d at 1110).

effected a traffic stop of plaintiff's vehicle without probable cause or reasonable suspicion. Plaintiff further states that defendants intentionally inflicted emotional distress on him and committed malicious abuse of process, through the circumstances of the traffic stop and the events that followed.

Plaintiff specifically alleges that defendant Bellinger followed plaintiff's vehicle too closely, and did not stop plaintiff's vehicle until plaintiff pulled into a gas station. During the traffic stop, defendant Bellinger yelled at plaintiff and spoke to him in an abusive and rude manner. Defendant Bellinger switched off his audio recording equipment, to avoid recording his abusive and rude behavior. Plaintiff alleges that defendant Bellinger had little law enforcement experience, had engaged in profiling in the past, was known to stop vehicles without probable cause, was known to turn off his recording equipment during traffic stops, and had abused the system in order to make numerous DUI arrests.

Plaintiff further alleges that after a jury acquitted him of the DUI charge, the defendants pursued administrative suspension of his driver's license, through defendant Bellinger's false testimony at the administrative hearing. Plaintiff alleges that defendant Bellinger's testimony at the administrative hearing contradicted his earlier testimony at the criminal trial in several respects. Specifically, at the administrative hearing, defendant Bellinger testified that he followed plaintiff's vehicle at a distance of eight to ten car lengths; at the trial he testified it was three to four car lengths. At the administrative hearing, defendant Bellinger testified that he observed plaintiff's vehicle weaving and crossing the white line; at the criminal trial defendant Bellinger testified that plaintiff was drifting (not weaving) and did not cross any white lines. Plaintiff alleges that defendant Bellinger changed his testimony to ensure that the administrative hearing resulted in the suspension of plaintiff's driver's license. Plaintiff's driver's license was suspended for two years.

Discussion and Analysis

Liberally construing plaintiff's Complaint, the Court finds that plaintiff is claiming that defendants violated his civil rights under the Fourth and Fourteenth Amendments of the United States Constitution, in stopping his vehicle without probable cause or reasonable suspicion.

42 U.S.C. §1983

Plaintiff's Complaint can be read as an action under 42 U.S.C. §1983.⁵ Section 1983 does not create substantive rights. Rather it provides a recovery mechanism for deprivation of a federal right.⁶ To establish a cause of action under § 1983, a plaintiff must allege (1) deprivation of a federal right by (2) a person acting under color of state law.⁷

Failure to State a §1983 Claim Against Defendant Bellinger

Plaintiff alleges that defendant Bellinger stopped his vehicle without probable cause or reasonable suspicion, which would be a violation of the Fourth Amendment. A traffic stop is valid under the Fourth Amendment if the officer has observed a traffic violation, or if the officer has a "reasonable articulable suspicion" that a traffic violation has occurred or is occurring.⁸ Plaintiff's

⁵42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁶*Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988).

⁷*Id.* (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)).

⁸*Whren v. United States*, 517 U.S. 806, 810 (1996) (Traffic stop valid "where the police have probable cause to believe that a traffic violation has occurred"); *U.S. v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998) (citing *United States v. Botero-Ospina*, 71 F. 3d 783, 787 (10th Cir. 1995), *cert. denied* 518 U.S. 1007 (1996) (reasonable articulable

Complaint does not mention the articulated reasons given for the stop, but merely states that defendant Bellinger stopped him after following at “an extremely close rate for 2.5 miles.”

Moreover, it is apparent from plaintiff’s averments that the criminal charges against plaintiff proceeded to trial in Douglas County. This could not have occurred absent a judicial determination that there was reasonable suspicion to stop plaintiff’s vehicle, and then probable cause to arrest plaintiff on the charge or charges. Plaintiff’s Complaint states that defendant Bellinger administered several tests at roadside to determine whether plaintiff was impaired, and that plaintiff refused to take a Breathalyzer test. That alone might have constituted probable cause. In any event, because plaintiff fails to assert any factual basis for a Fourth Amendment violation, his Complaint fails to state a claim against defendant Bellinger under 42 U.S.C. §1983. The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief,⁹ or when an issue of law is dispositive.¹⁰ The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations,¹¹ and all reasonable inferences from those facts are viewed in favor of the plaintiff.¹² The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to

suspicion of traffic violation is valid basis for traffic stop).

⁹*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998).

¹⁰ *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

¹¹ *Maher*, 144 F.3d at 1304.

¹² *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984).

offer evidence to support the claims.¹³ It is not the court's function "to weigh potential evidence that the parties might present at trial."¹⁴ The court construes the allegations in the light most favorable to the plaintiff.¹⁵ These deferential rules, however, do not allow the court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged."¹⁶ Dismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice.¹⁷ However, as the Tenth Circuit has held, conclusory allegations are insufficient to state a claim for which relief may be granted under 42 U.S.C. § 1983.¹⁸

Plaintiff offers conclusory allegations about defendant Bellinger's motive in stopping him-- that defendant Bellinger stopped him after following him closely for a distance. But, plaintiff does not state any facts that might demonstrate that there was no reasonable suspicion or probable cause to stop the vehicle. To the extent that plaintiff's §1983 claim is based on malicious prosecution as a Fourth Amendment violation, his Complaint similarly fails.

In analyzing a § 1983 claim for malicious prosecution, the court begins with the elements of this common law cause of action under Kansas law: (1) the defendant instituted, procured or continued the

¹³*Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

¹⁴*Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

¹⁵*Scheuer v. Rhodes*, 416 U.S. at 236; *Hall v. Bellmon*, 935 F. 2d at 1109.

¹⁶*Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) (footnote omitted).

¹⁷*Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989).

¹⁸*Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981); *see generally*, *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998) (reversing district court's denial of a motion to dismiss based upon qualified immunity where Plaintiff had advanced only conclusory allegations that defendants denied him equal protection).

criminal proceeding of which the complaint is made; (2) the defendant in so doing acted without probable cause and with malice; (3) the proceeding terminated in favor of the plaintiff; and (4) the plaintiff sustained damages.¹⁹ Plaintiff fails to state a claim for malicious prosecution as a matter of law, because Plaintiff cannot show under any circumstances, that defendant Bellinger instituted, procured, or continued a criminal proceeding without probable cause.

Failure to State a §1983 Claim Against Defendant Douglas County Sheriff's Department

Even if plaintiff stated a §1983 claim against defendant Bellinger, he has not stated a claim against defendant Douglas County Sheriff's Department.²⁰ A § 1983 suit against a municipality "and a suit against a municipal official acting in his or her official capacity are the same."²¹ A plaintiff suing a local government under § 1983 for the acts of one of its employees must prove: (1) that a local government employee committed a constitutional violation, and (2) that a government policy or custom was the moving force behind the constitutional deprivation.²² It is well established that a municipality cannot be held liable under § 1983 for the acts of an employee if there is no underlying constitutional violation.²³

¹⁹*Braun v. Pepper*, 224 Kan. 56, 578 P.2d 695 (1978); *Thompson v. General Finance Co.*, 205 Kan. 76, 468 P.2d 269 (1970).

²⁰In its motion to dismiss, Douglas County Sheriff's Department states that plaintiff's complaint is deficient in that it fails to identify a legally cognizable entity. Douglas County Sheriff's Department is not a separate governmental entity from Douglas County, and cannot be sued separate and apart from Douglas County.

²¹*Watson v. City of Kansas City*, 857 F.2d at 695 (citation omitted).

²²*Myers v. Oklahoma Bd. of County Comm'rs*, 151 F.3d at 1316 (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)).

²³*Id.* (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam)).

Furthermore, liability against a municipality under a theory of *respondeat superior* is unavailable for claims asserted pursuant to § 1983. It is well-settled that a governmental entity “may be held liable under § 1983 only for its own constitutional or illegal policies and not for the tortious acts of its employees.”²⁴ Municipal liability may not be premised upon the employment of a person who has violated a plaintiff’s federally protected rights.²⁵ Instead, a municipal wrong is one resulting from the enforcement of a municipal policy or custom.²⁶ To establish municipal liability, “a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation alleged.”²⁷

Although plaintiff’s Complaint can be read liberally to allege a constitutional violation by defendant Bellinger, the Complaint does not state nor demonstrate that a government policy or custom was the moving force behind the constitutional deprivation. The Complaint states that in July 2002, an unidentified Douglas County Sheriff’s deputy told plaintiff that as patrol officers, deputies “are instructed to do whatever it takes to keep drunk drivers off of the road.” But this ambiguous, stray comment neither demonstrates nor suggests that the Douglas County Sheriff’s Department had a policy, custom or persistent practice of violating constitutional rights for purposes of keeping drunk drivers off the

²⁴*Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) (citing *Monell v. Department of Soc. Servs.*, 436 U.S. at 694).

²⁵*Id.*

²⁶A “municipal custom or policy” may be established through an officially promulgated policy, *Monell*, 436 U.S. at 694, a custom or persistent practice, deliberately indifferent training that results in the violation of a plaintiff’s federally protected rights, *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989), or a single decision by an official with final decision-making authority, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-24 (1988).

²⁷*Jenkins v. Wood*, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing *City of Canton*, 489 U.S. at 385).

road. Plaintiff also alleges that defendant Bellinger had a history of making traffic stops “with no probable cause,” and of “pulling people over for traffic stops and not turning on his audio recording tape.” But plaintiff neither alleges nor demonstrates that such conduct by defendant Bellinger had any nexus to an official custom or policy of the defendant county. Plaintiff’s Complaint utterly fails to state a claim against the county under § 1983.

No Subject Matter Jurisdiction of State Law Claims

In addition to the § 1983 claims, plaintiff’s complaint can be read to assert state law claims, the torts of intentional infliction of emotional distress and malicious abuse of process and/or malicious prosecution. “Federal courts are courts of limited jurisdiction.”²⁸ This court’s jurisdiction is established by the Constitution and acts of Congress.²⁹ There are two statutory bases for federal subject matter jurisdiction. First, under 28 U.S.C. § 1332, federal district courts have original jurisdiction of civil actions where complete diversity of citizenship and an amount in excess of \$75,000 (exclusive of interest and costs) in controversy exists. Second, under 28 U.S.C. § 1331, federal district courts “have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States,” or federal question jurisdiction. In addition, if the court has federal question or diversity jurisdiction of some claims, it may exercise supplemental jurisdiction over state law claims.³⁰

The Tenth Circuit has commented on the limited jurisdiction of the federal courts and

²⁸*Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994).

²⁹*See United States v. Hardage*, 58 F.3d 569, 574 (10th Cir. 1995) (“Federal courts have limited jurisdiction, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982), and they are not omnipotent. They draw their jurisdiction from the powers specifically granted by Congress, *id.* at 701-02, and the Constitution, Article III, Section 2, Clause 1.”)

³⁰28 U.S.C. §1367.

summarized the duties of the district court in considering whether it has jurisdiction to consider a case:

The Federal Rules of Civil Procedures [sic] direct that “whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” . . . Moreover, “[a] court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.” . . . Nor may lack of jurisdiction be waived or jurisdiction be conferred by “consent, inaction or stipulation. Since federal courts are courts of limited jurisdiction, there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof.”³¹

In this case, there is no diversity jurisdiction of the state law claims, for plaintiff states in his Complaint that he resides in Williamsburg, Kansas and formerly resided in Ottawa, Kansas. Thus, the Court lacks subject matter jurisdiction of his state claims. By statute, the court is authorized to decline supplemental jurisdiction upon the dismissal of all claims over which it had original jurisdiction.³² The exercise of supplemental jurisdiction is committed to the court’s sound discretion.³³ 28 U.S.C. § 1367 “reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, ‘a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness and comity.’”³⁴ “Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary.”³⁵

³¹*Penteco Corp. Ltd. Partnership–1985A v. Union Gas System*, 929 F.2d 1519, 1521 (10th Cir. 1991) (citations and quotations omitted).

³²28 U.S.C. § 1367(c)(3).

³³*City of Chicago v. International College of Surgeons*, 522 U.S. 156, 172-73 (1997); *see Anglemeyer v. Hamilton County Hosp.*, 58 F.3d 533, 541 (10th Cir. 1995).

³⁴*City of Chicago*, 522 U.S. at 173 (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988)); *see also Gold v. Local 7 United Food and Commercial Workers Union*, 159 F.3d 1307, 1310 (10th Cir. 1998).

³⁵*Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990).

This case was removed to federal court pursuant to 28 U.S.C. §§1441, based on Plaintiff's §1983 claims. Because the Court dismisses the federal claims, over which it had original jurisdiction, the Court in its discretion declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims.³⁶ Given this, the Court remands the case to the District Court of Douglas County, Kansas for further proceedings on Plaintiff's state law claims.³⁷

IT IS THEREFORE ORDERED BY THE COURT that Defendants' Motion to Dismiss (Doc. 9) is **GRANTED** with respect to plaintiff's federal claims under § 1983, **DENIED WITHOUT PREJUDICE** as moot with respect to plaintiff's state law claims, and this action is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED, that the Court declines to exercise supplemental jurisdiction over the state law claims and the **CASE IS REMANDED** to the District Court of Douglas County, Kansas for further proceedings on plaintiff's state law claims pursuant to 28 U.S.C. § 1367(c)(3) and § 1447(c).

IT IS SO ORDERED.

Dated this 5th day of May 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

³⁶See 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Tucker v. Spring Hill United School District No. 230*, 2002 WL 389286, *2-3 (D. Kan. Feb. 27, 2002).

³⁷See 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."); *see also* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise")